Office - Supreme Court, U.S.
FILED
SEP 22 1982
ALEXANDER L. STEVAS,
CLERK

82-535

No.

IN THE

Supreme Court of the United States

R. C. FRENCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

SHAW HOWLETT & SCHWARTZ
CHARLES M. SHAW
225 South Meramec, Suite 324T
Clayton, Missouri 63105
725-9700
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AS EVIDENCED BY ITS OPINION OF JULY 28, 1982, ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI FINDING DEFENDANT GUILTY ON THREE COUNTS OF VIOLATING 7 U.S.C. SEC. 2024(b) (FOOD STAMPS - ILLEGALLY OBTAINING) IN THAT:

A. THIS CASE CONSTITUTES A CONVICTION OF ILLEGALLY BUYING FOOD STAMPS BASED ON ENTRAPMENT. THE GOVERNMENT'S EVIDENCE ESTABLISHED THAT THE ORIGINAL DESIGN AND INITIATION OF THIS CRIME OCCURRED IN THE MIND OF, AND AT THE INSTIGATION OF, AND IMPLEMENTATION OF GOVERNMENT AGENTS. DEFENDANT WAS NOT TRAFFICKING IN FOOD STAMPS AND WAS NOT PREDISPOSED TO BUY THE SAME. HE WAS SELECTED AS A TARGET BECAUSE OF PRIOR FELONY CONVICTION AND BECAUSE HE WAS PLACED ON PROBATION FOR THE SAME. THE ACTIONS OF THE GOVERNMENT AGENTS HEREIN CONSTITUTED "ENTRAPMENT" AS A MATTER OF LAW, AND THE TRIAL COURT AND APPELLATE COURT ERRED IN FAILING TO SO DECLARE.

THE GOVERNMENT FAILED TO OFFER SUFFICIENT EVIDENCE SHOWING PREDISPOSITION ON THE PART OF THE DEFENDANT SO AS TO MAKE THE MATTER A JURY QUESTION.

FURTHER, THE ACTIONS OF THE GOVERNMENT AGENTS AMOUNTED TO ACTIONS OF AGENTS PROVOCATUER AND SHOULD BE CONDEMNED AS AGAINST PUBLIC POLICY. GOVERNMENTAL AGENTS SHOULD NOT BE ALLOWED TO MAKE SUBJECTIVE DECISIONS AS TO THE PREDISPOSITION OF INDIVIDUALS TO COMMIT CRIMES AND TO THEREAFTER CREATE CRIMES TO ENTRAP INDIVIDUAL DEFENDANTS. SUCH AGENTS MUST BE RESTRICTED IN MAKING ENTRAPMENT ARRESTS BASED ON KNOWN TRANSGRESSORS AND TRANSGRESSIONS OF THE LAW.

TABLE OF CONTENTS

Questions Presented i

Opinions Below 1

Jurisdiction 2

Relevant Statutes 2

Statement of the Case 3

Reasons for Granting the Writ 7

Conclusion 10

Proof of Service 11

Appendix:

Appendix A - Judgment and Order of the United States District Court for the Eastern District of Missouri, Eastern District, of September 4, 1981 in United States v. R. C. French A-1

Appendix B - Opinion of the United States Court of Appeals, Eighth Circuit of July 28, 1982 in United States v. R. C. French A-4

Appendix C - Order of United States Court of Appeals, Eighth Circuit denying Appellant's Petition for Rehearing and Rehearing En Banc, August 24, 1982 in United States v. R. C. French A-14

Cases Cited

United States v. French, 483 F.Supp. 523 (E.D. Mo. 1980), *rev'd* 628 F.2d 1069 (8th Cir. 1980), *cert. denied* 449 U.S. 956, 66 L.Ed.2d 221 (1980) 4,7

Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) 8,9

Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 2d 848 (1958) 8,9

Hampton v. United States, 425 U.S. 484; 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) 8,9

United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973)..... 8,9

United States v. Watson, 489 F.2d 504 (3rd Cir. 1973) .. 8

United States v. Jannotti, 673 F.2d 578 (3rd Cir. 1982).. 10

United States v. Lemmons, 420 F.2d 135 (3rd Cir. 1972) 10

Statutes Cited

7 U.S.C. Sec. 2023(b) 2

No.

IN THE

Supreme Court of the United States

R. C. FRENCH,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

R. C. French, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in the above-entitled cause on July 28, 1982.

OPINIONS BELOW

This cause was originally decided by the United States District Court for the Eastern District of Missouri, Eastern Division, on September 4, 1981, see Appendix "A". Subsequently, this cause was then decided by the United States Court of Appeals

for the Eighth Circuit on July 28, 1982, see Appendix "B". A Petition for Rehearing, or in the Alternative, Motion for Rehearing En Banc was timely filed with the United States Court of Appeals, Eighth Circuit, on August 6, 1982. The Petition for Rehearing and or Rehearing En Banc was ordered denied on August 24, 1982. See Appendix "C".

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 28, 1982. The order of the United States Court of Appeals, Eighth Circuit, denying Petitioner's Motion for Rehearing, or in the Alternative, Motion for Rehearing En Banc was entered on August 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Rule 19.1(b) of the Rules of the Supreme Court of the United States.

RELEVANT STATUTES

7 U.S.C. Section 2023(b)

Food Stamps - Violations and Enforcement.

(b) Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorizations to purchase cards in any manner not authorized by this Chapter or the regulations issued pursuant to Chapter shall, if such coupons or authorizations to purchase cards are of the value of One Hundred Dollars ($100.00) or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than Ten Thousand Dollars ($10,000.00) or imprisoned for not more than five (5) years or both, or, if such coupons or authorizations to purchase cards are of the value of less than One Hundred Dollars ($100.00), shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than Five Thousand Dollars ($5,000.00) or imprisoned for not more than year or both.

STATEMENT OF THE CASE

R. C. French was charged under indictment by a Federal Grand Jury with three counts of acquiring and possession of food stamps in a manner not authorized by law or regulations, in violation of 7 U.S.C. Section 2023(b). He was tried in the District Court for the Eastern District of Missouri and was found guilty on all three counts. He was sentenced to imprisonment of five years and a fine of $1,000.00 on each count, the sentences to run concurrently.

An appeal was taken to the United States Court of Appeals for the Eighth Circuit. The Appellate Court rejected the three basic arguments of the defendant; the first based on the question whether defendant in purchasing food stamps from undercover police officers was the victim of "entrapment;" the second based on instructions and the alleged failure of the government to produce sufficient evidence to prove a willful or intentional violation of the law; and the third based on procedural questions concerning introduction of evidence relative to a prior conviction.

The Eighth Circuit filed its Judgment and Opinion on July 28, 1982 affirming the District Court's Judgment and denying defendant's allegations on appeal. The defendant then moved the Court for a rehearing, or for hearing by the Court en banc. The same was denied on August 24, 1982. It is from that denial that the petitioner seeks this writ.

In presenting the facts in the light most favorable to the Government, the following evidence presented at trial is relevant to this Petition:

Marvin Koechig, Jr., a Special Agent with the office of the Inspector General for Investigation, United States Department of Agriculture, first became interested according to his testimony when he read accounts in both St. Louis newspapers

about French's earlier federal conviction.[1] Koechig read the newspapers and understood that defendant's counsel, in his request for probation, had claimed that the defendant was working sixty-two to eighty hours a week in a grocery store which was identified in the newspapers. Koechig says that he then became interested, since his job was to check grocery stores for food stamp violations. In his newly acquired interest he found that the store involved, Courtesy Country Store, had been the subject of a request for criminal investigation in September, 1980, and that its food stamp volume was more than one hundred percent of the gross reported sales. Koechig admitted that he had absolutely no knowledge that French was in any way dealing in, buying, or selling, or trafficking in food stamps. He claimed his only knowledge of French was the newspaper reports of French's conviction and subsequent probation.

Koechig contacted St. Louis Police Officer Antionette Lee, who worked under cover with him on earlier occasions looking for food stamp violators. Koechig provided Lee with three $50.00 books of food stamps and drove her to the Courtesy Country Store on January 7, 1981. She identified French and approached him. She had been instructed to approach French and no one else. She asked French if he knew anyone discounting food stamps. French asked her what she meant. French then indicated that the owner didn't like for them (the employees) to do it, but asked how many books she had. She had three $50.00 books. He subsequently offered her $50.00 for the books and she accepted the same and left.

---

[1] United States v. French, 483 F.Supp. 523 (E.D.Mo. 1980), *rev'd* 628 F.2d 1069 (8th Cir. 1980), *cert. denied* 449 U.S. 956, 66 L.Ed.2d 221 (1980). French's conviction for use of his office, as Chief Marshall for the City of St. Louis, to collect funds illegally, was set aside by the District Court but reinstated by the Eighth Circuit Court of Appeals. Certiorari was denied by the Supreme Court. Defendant was thereafter placed on probation by the District Court, and was on probation at the time of the violations alleged herein occurred.

No charges were immediately brought forward by Agent Koechig, but approximately six months later, on July 25, 1981, he resumed his investigation activities, not against the one hundred percent plus Courtesy Country Store, but the defendant French. Koechig had used an informant, James Louis, used by the FBI and various other Governmental agencies to locate French. French had quit his job as a clerk at the grocery store and was at this time working in a dry cleaning store. Koechig got the informant Louis to introduce the defendant to yet another undercover police officer, Rosalyn Morgan. Officer Morgan was equipped with a recording device and on July 25th drove with the informant to the cleaning establishment. French came to the car parked outside of the cleaning establishment at the request of the informer to meet a lady who had some stamps. French indicated that he didn't have the money and told the undercover female officer to get in touch with him later. She indicated that the stamps were not hot and that she needed to pay her rent, and all she wanted was a "little bit." French told her that he knew other persons, naming one Sweeney and Clemmons that might be interested after her repeated proposition that she could get her hands on as many stamps as she could get rid of. French told her that nothing was worth going to the penitentiary for. Morgan continued the conversation by suggesting that they go thirds on whatever she had, and French replied, "Okay . . . I know I can handle some." French asked that any calls to his house be made by Louis, the informer, and not Morgan, the female undercover officer. The defendant finally paid $65.00 ($75.00) for three books the lady had offered. A subsequent phone call by the informer led to arrangements for a meeting on June 26th.

The following day, June 26, 1981, the defendant was approached by Morgan, the undercover officer. Her story was that "her man" needed travel money and was getting "peeved." French wanted to take the officer out, but she declined. He subsequently purchased five more books for $100.00 on that day from her.

The agent continued making phone calls to the defendant to induce him into further purchases, but none were consummated.

The Government additionally provided evidence that some of the stamps purchased by French were ultimately cashed.

This was the basic evidence most favorable to the Government against the defendant and does not include defendant's evidence of the transaction.

REASONS FOR GRANTING THE WRIT

I

This case stated when a government agent, one Marvin Koechig, Jr., a Special Agent with the Office of the Inspector General of Investigation, United States Department of Agriculture, first became interested in the defendant when he read accounts in both St. Louis newspapers about French, then Chief Marshall of the City of St. Louis, having been convicted of the Hobbs Act violation.[1] French was paroled by the District Court and was working sixty to eighty hours a week in a grocery store. The agent decided to check out this convicted-paroled felon.

The further activities of the agent involved are detailed in the Statement of the Case. They are partially repeated here since they constitute the foundation of defendant's legal argument.

The basic claim of the defendant in his appeal of this matter is that the government failed to prove by sufficient evidence that the defendant was "predisposed" to commit the crime involved; that the Court's allowance of an instruction to the jury was an evasion of the Court's duty; and that the Court failed in its duty to declare, as a matter of law, that the defendant was "entrapped." Defendant contends the prosecution had failed to sustain its burden of proof so as to make a submissible case to a jury on the question of "entrapment," so as to allow the matter to be submitted to the jury for their decision.

This case is an example of the particular selection of an individual by a Governmental enforcement or agency to be targeted and for whatever reasons punished. He was selected

---

[1] *United States* v. *French*, 483 F.Supp. 523 (E.D.Mo. 1980), *rev'd* 628 F.2d 1069 (8th Cir. 1980), *cert. denied* 449 U.S. 956, 66 L.Ed.2d 221 (1980).

because he was a felon on probation. The "entrapment" was a "honey pot" governmental technique that has been repeatedly used by the FBI and other governmental agencies.

The question of entrapment has long been acknowledged by this Court as a defense. *Sorrells* v. *United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). The definition of the defense was more clearly presented by this Court in the case of *Sherman* v. *United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). The Court there held that a government agent repeatedly soliciting a drug addict who was trying to go straight, was guilty of entrapment as a matter of law. The Court indicated federal public policy determined that it is better to let a technical transgressor go free than to allow federal law enforcement officials to manufacture crime that entraps the unwary innocent.

The entrapment defense has two interrelated, but distinct elements: Inducement and Predisposition. See *Hampton* v. *U.S.*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), and *United States* v. *Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).

In this case there is no question that a specific inducement was made directly and solely to the individual defendant to buy unauthorized food stamps at a bargain price. The agent stated that defendant's employer was suspect of overdealing in stamps but admittedly went after the defendant specifically and made no effort to follow up on the employer.

When such a set of facts is presented and the entrapment issue is joined, the burden is on the government "to disprove the whole defense beyond a reasonable doubt." *United States* v. *Watson*, 489 F.2d 504, 510 (3d Cir. 1973).

In other words, it is up to the government to then prove that the defendant was "predisposed" to commit the crime. "The controlling question is whether the defendant is a person other-

wise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." See *Sorrells, supra,* 287 U.S. at 451, 53 S.Ct. at 216.

The Eighth Circuit in rendering its decision, appallingly uses the *Sherman, supra,* case to conclude that officers herein had trapped an "unwary criminal" as opposed to a presumed innocent. The Eighth Circuit seems to fail to realize that in *Russell* and specifically the *Hampton* case, *supra,* upon which it relies, the defendants admitted to a predisposition to commit the crimes alleged and were engaged in the usage of drugs and the manufacture of them at the time they were apprehended. Defendant was not involved, alleged to be involved, or proven to be involved in trafficking in food stamps in any way. The fact that he was on probation does not make him an unwary criminal, see *Russell, supra.* A distinction in the type of cases must be made. The defendant was a *passive* target. He was not engaged in criminal activity. The government agent, on the other hand was *actively* engaged in criminal activity.

The crux of the problem in this case, as in any entrapment case, is the question of being "innocent until proven guilty." Have we foregone that right? Can a subjective decision made by a police officer transfer us to the presumed "guilty" class? Will agents provocatuer be allowed in this Republic? Will any limitations be placed upon them?

A minimum legal threshold as to the elements of entrapment must be established in any case. If the minimum requirements of proof are not met by the prosecution as herein, then the Court as a legal matter must strike down the case. When the prosecution clearly showed a design of inducement originating in a federal officer's mind directed toward one individual in order to try to obtain a conviction of that individual, then the government must present clear and convincing evidence, sufficient for

a jury to make a reasonable judgment as to the defendant's predisposition, if any. There was no evidence presented as to French having either dealt in food stamps or having previously acquired the same. The prosecutor having failed to produce such evidence, the Court must, as a matter of law, rule for the defendant and dismiss the case. See, *United States* v. *Jannotti*, 673 F.2d 578 (1982) and the dissent therein. The trial Court failed to do so, and the Appellate Court failed to remedy that error. The Appellate Court's conclusion that defendant's own wiretapped statements were sufficient to create a question of fact for the jury on the question of entrapment is erroneous, see *U.S.* v. *Lemmons*, 420 F.2d 135 (3rd Cir. 1972). We ask for this writ so that a full hearing on the question of "entrapment" can be had, reviewed, and ruled upon.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SHAW, HOWLETT &
SCHWARTZ
Charles M. Shaw
225 South Meramec, Suite 324T
Clayton, Missouri 63105
725-9700
Attorneys for Petitioner

PROOF OF SERVICE

This is to certify that Charles M. Shaw, Shaw, Howlett & Schwartz, Attorneys for Petitioner herein, have served upon the following, three copies of the above Petition for Writ of Certiorari: Solicitor General, Department of Justice, Washington, D.C. 20530: Thomas Dittmier, United States Attorney, 1114 Market Street, St. Louis, Missouri 63101.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 81-124 Cr (C)
Court No. C

United States of America,
Plaintiff,

vs.

R. C. French,
Defendant.

St. Louis, Missouri
September 4, 1981

TRANSCRIPT OF SENTENCING

Transcript of proceedings had during the sentencing in the above-styled cause before

HONORABLE JAMES H. MEREDITH

Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. C thereof.

APPEARANCES:

MR. TIMOTHY WILSON, Assistant United States Attorney, attorney for the government.

MR. CHARLES M. SHAW, attorney for the defendant.

The defendant appears in person.

• • • •

THE COURT: United States versus R. C. French.

MR. WILSON: Good morning, your Honor.

This matter is before the Court this morning for a sentencing based on a jury verdict of guilty on three counts on a case tried the week of August the 17th. Mr. French is here with his counsel, Mr. Shaw.

THE COURT: Mr. French, do you have anything to say to the Court before sentence is imposed?

THE DEFENDANT: Yes, sir, your Honor. I would like to say that I was shocked at the time that it was announced that I was working 60 to 70, 80 hours a week at a grocery store. Then I became a target of an investigation. I, also that I tried to follow the instructions of the probation I had to the letter and that that's about all I have to say, your Honor. Thank you.

THE COURT: Does your lawyer have anything to say in his behalf?

MR. SHAW: Your Honor, my opinion of the scandalous and outrageous conduct of the Department of Agriculture in this matter is well known. I hesitate to say anything about the defendant because the last time I did that was used to focus an investigation upon him, and I just can't believe that you would put him in the penitentiary upon what we have heard here in this Court.

You realize that if this sort of conduct is permitted on the part of the government, our people are going to be like people that live in foreign lands. We won't be able to answer the telephone or talk to strangers. We'll have to drop our eyes on the ground when we walk along and not speak to anybody for fear an indiscretion is recorded and we end up before a court of law.

He has been a citizen that has tried to do what was right. He was just — he did not use his head. I get so mad I could almost

want to hit him for fooling with these people that came in there, but they set him up, Judge, and that's all there is to it.

THE COURT: Well, the jury's passed on that question at trial.

MR. SHAW: Yes, sir.

THE COURT: And that's settled so far as I am concerned.

Mr. French, on the finding of guilty by the jury, the Court will sentence you to five years in the custody of the Attorney General, and a $1,000 fine on each count, and the time will run concurrently.

In the event of an appeal, you may remain released on your existing bond.

MR. SHAW: Thank you, sir.

• • • •

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1968

United States of America,
Appellee,

v.

R. C. French,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: February 11, 1982

Filed: July 28, 1982

Before HEANEY, ARNOLD and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The significant issue in this appeal is whether defendant R. C. French, in purchasing food stamps from undercover police officers, was entrapped as a matter of law. This in turn involves the question of whether French had the predisposition to commit these criminal acts. The defense of entrapment and the issue

of French's predisposition was submitted to the jury[1] and French was convicted of three counts of acquiring and possessing food stamps in a manner not authorized by law or regulations, in violation of 7 U.S.C. § 2024(b). He was sentenced to imprisonment of five years and a fine of $1,000 on each count, the sentences to run concurrently. We affirm the judgment of the district court.

For French to establish that there was entrapment as a matter of law and that he was entitled to acquittal.

> [T]he evidence must clearly have indicated that a government agent originated the criminal design; that the agent implanted in the mind of an innocent person the disposition to commit the offense; and that the defendant then committed the criminal act at the urging of the government agent.

United States v. *Shaw*, 570 F.2d 770, 772 (8th Cir. 1978); *see also United States* v. *Gurule*, 522 F.2d 20, 23 (10th Cir. 1975), *cert. denied*, 425 U.S. 975, 48 L. Ed. 2d 800 (1976). The evidence must thus be examined to determine whether the police

---

[1] The instruction, patterned after 1 E. Devitt and C. Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 13.09, and approved in United States v. Shaw, *infra*, was given:

> If, then, the jury should find beyond a reasonable doubt . . . the defendant was ready and willing to commit crimes . . . whenever opportunity was afforded, and that government officers or their agents did not more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

officers implanted the disposition in an innocent French to purchase the food stamps, or whether French had a predisposition to purchase the stamps and violate the law and the agents simply provided this opportunity to him.

In determining whether there was a jury issue on the question of entrapment, we must review the evidence in the light most favorable to the government. *United States* v. *Brown*, 453 F.2d 101, 104 (8th Cir. 1971), *cert. denied* 405 U.S. 978, 31 L. Ed. 2d 253 (1972); *United States* v. *Jannotti*, 673 F.2d 578, 598 (3d Cir. 1982). *See also: Glasser* v. *United States*, 315 U.S. 60, 86 L. Ed. 680 (1942).

Marvin Koechig, Jr., a Special Agent with the Office of the Inspector General of Investigation, United States Department of Agriculture, first became interested in defendant R. C. French when he read accounts in both St. Louis newspapers about French's earlier federal prosecution.[2] French's lawyer was quoted as saying that French was working 60 to 80 hours in a grocery store. Koechig found that the store, Courtesy Country Store, 5903 Delmar, St. Louis, had been the subject of a request for criminal investigation in September 1980, and that its food stamp volume was more than 100% of the gross reported sales. Koechig has no knowledge that French was dealing in food stamps, but knew only of the reported conviction.

Koechig contacted St. Louis Police Officer Antinoette Lee, who worked under cover with him on earlier occasions in looking for food stamp violators. Koechig provided Lee with three $50 books of food stamps and drove her to the Courtesy Country Store on January 7, 1981. When she entered the store, she

---

[2] United States v. French, 483 F. Supp. 523 (E.D. Mo. 1980), *rev'd* 628 F.2d 1069 (8th Cir. 1980), *cert. denied* 449 U.S. 956, 66 L. Ed. 2d 221 (1980). French's conviction for use of his official office to collect funds illegally was set aside by the district court, but reinstated by this court.

heard a stock boy refer to the person behind the meat counter as Mr. French. She approached French and asked him if he knew of anyone that was discounting food stamps.[3] French answered, "The owner doesn't like for us to do it, but how many books do you have?" Lee told him she had three $50 books, and he offered her $50 for them. She protested the price was cheap, but French said, "take it or leave it," and they exchanged the three books of stamps for $50.[4]

Several months later, Koechig used an informant, James Louis, to again locate French. French was working in a dry cleaning store. Louis introduced French to another undercover police office, Roslyn Morgan. Officer Morgan was equipped with a recording device and on June 25 drove with Louis to the cleaners. French came to the car,[5] and said that as his wife didn't have the money, he couldn't "come up with the loot,"

---

[3] Discounting is a common term for exchanging food stamps for money unlawfully and is readily understood by those who deal with food stamps. Lee admitted French asked the meaning of the term, although earlier in her testimony she had denied he asked the question.

[4] French's recollection of the conversation with Lee differed. French says he told Lee that he didn't buy food stamps and that she answered, "You was my last hope and I am desperate." French then asked how many stamps she had, and made the statement that the management didn't allow them to buy anything inside the store. Lee repeated that he was her last hope and she needed money for the rent, and told him she had six books to sell. French said that he didn't have that much money, asked Lee's price and said he didn't know the price because he had never bought stamps. French said he had $50, obtained another $25 from one of the clerks working in the store, and bought the three books from Lee for $75. With this conflicting evidence, the issue of entrapment was properly submitted to the jury. United States v. Shaw, *supra* at 772; United States v. Gurule, *supra* at 23.

[5] This and succeeding conversations with French were recorded. The tapes were introduced into evidence and played to the jury. Transcripts of the conversation were used in examining the witnesses.

and told Morgan to get in touch with him later. Morgan twice said she could put her hands on as many stamps as she could get rid of, and French twice replied, "You can?" French told Morgan that other persons, Sweeney and Clemmons, would take the stamps. Nothing was worth going to the penitentiary for, French said. Morgan continued the coversation by suggesting that they go for thirds on whatever she had, and French replied, "Okay . . . I know I can handle some." French was specific that Louis, and not Morgan, was to call him at home, but they discussed what additional stamps Morgan would bring. French said, "I can take a bill thing 'cause I supposed to pick up some money this afternoon." After considerable haggling, the conversation closed with French buying three of the books for $65 and agreeing that when Louis called, French would tell him how many books to bring.

The following day, June 26, 1981, French purchased five books from Morgan for $100 and he said, "I'll enjoy spending those . . . ." He again said that nothing was worth going to the penitentiary for, and agreed that Morgan would call the store later.[4]

In other later conversations, on June 30 and July 2, French, while making purchases of stamps, made other statements that he was going to stock up while he got a chance, that he had enough stamps to last six months and that he was going to get more and use them to buy food while he opened a cleaning and grocery store business.

We reject French's arguments that undisputed facts establish entrapment as a matter of law as in *Sherman* v. *United States*, 356 U.S. 369, 2 L. Ed. 2d 848 (1958). Further, the evidence does not clearly show that the government agent originated the

---

[4] Count I of the charges against French was based on the January 7 purchase, Count II on the June 25 purchase, and Count III on the June 26 purchase.

criminal design or implanted in the mind of an innocent person the disposition to buy the food stamps, or that French bought the food stamps at the urging of the government agent. *United States* v. *Shaw, supra.*

Police Officer Lee went to the grocery store where food stamp redemptions exceeded sales, and where French was employed. Her initial contact with French, viewed most favorably to the government, contained nothing more than a question as to whether he knew if anyone was discounting food stamps. French's immediate response that led to the purchase of the stamps demonstrated predisposition on his part. Lee's question merely afforded the opportunity or facility for the commission of the offense and was not entrapment. *Sorrells* v. *United States,* 287 U.S. 435, 77 L. Ed. 413 (1932).

The purchase of contraband by the government agent was held not to be entrapment in *Kibby* v. *United States,* 372 F.2d 598, 602 (8th Cir. 1967), *cert. denied* 387 U.S. 931, 18 L. Ed. 2d 993 (1967). Here we deal with a sale instead of a purchase, but this first sale does not show any urging by the government agent or implanting in the mind of an innocent the disposition to purchase. Insofar as French's testimony differs from that of Lee, it simply creates a conflict of evidence that was properly submitted to the jury.

The predisposition demonstrated by French in January was relevant to the question of his predisposition to buy stamps in June and July. *United States* v. *Demetre,* 464 F.2d 1105, 1108 (8th Cir. 1972); *United States* v. *Viviano,* 437 F.2d 295 (2d Cir. 1971), *cert. denied* 402 U.S. 983, 29 L. Ed. 2d 149 (1971). When Officer Morgan first approached French on June 5, her statement that she could put her hands on as many stamps as she could get rid of brought an immediate expression of interest from French—"You can?" —, suggestions of other individuals that might be interested in stamps, discussions of later telephone

calls and an immeidate agreement to purchase three or four books. While the conversation reveals that Morgan was much more aggressive than Lee in her contacts with French on June 25 and June 26, artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Sorrells* v. *United States, supra.* Morgan may have continued the conversation more determinedly, and she may have cajoled and implored defendant to buy the stamps, but such activity creates a factual issue as to whether there is entrapment. *Kibby* v. *United States, supra* at 602; *United States* v. *Emory,* 468 F.2d 1017, 1019 (8th Cir. 1972).

We have carefully analyzed the conversations of January 7, June 25 and June 26. We conclude that these conversations and the activities of the undercover officers were sufficient to justify a jury concluding beyond a reasonable doubt that French was predisposed to buy the food stamps. Accordingly, the undercover officers did not set a "trap for the unwary innocent" but, rather, a "trap for the unwary criminal." *See: Sherman* v. *United States,* 356 U.S. at 372, 2 L. Ed. 2d at 851.

The cases cited by French, *Sorrells* v. *United States, supra; Sherman* v. *United States, supra; United States* v. *Russell,* 411 U.S. 423, 36 L. Ed. 2d 366 (1973); and *Hampton* v. *United States,* 425 U.S. 484, 48 L. Ed. 2d 113 (1976), do not support his argument that acquittal was required in this case, but demonstrate that the critical issue was whether French was predisposed to buy the food stamps.[1] This issue was submitted to and decided by the jury. The district court did not err in denying defendant's motion for acquittal.

---

[1] Entrapment was discussed in detail in a recent decision of the Third Circuit arising out of the Abscam operation, United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982). Both the majority and vigorous dissenting opinion in Jannotti recognize that predisposition is the determinative issue. Where there is proof of predisposition to participate in the illegal activity, even the dissent would recognize the submissibility of the issue in this case. *Id.* at 616-617.

French urges other trial errors. He argues that the indictment failed to define a criminal act and was not sufficiently clear as to properly and constitutionally state the wrong committed. The indictment charged in each of the counts that on a specified date the defendant "did knowingly acquire and possess food stamps . . .[1] in a manner not authorized by Chapter 51, Title 7, United States Code, or the regulations issued pursuant to such chapter, in violation of Title 7, United States Code § 2024(b)." The indictment follows the wording of the statute. It fully, expressly and without ambiguity sets forth the elements necessary to constitute the offense, and contains a statement of facts and circumstances sufficient to inform the accused of the offense with which he is charged. *Hamling* v. *United States*, 418 U.S. 87, 117-120, 41 L. Ed. 2d 590, 620-22 (1974). In *United States* v. *Miller*, 543 F.2d 1221, 1224 (8th Cir. 1976), *cert. denied* 429 U.S. 1108, 51 L. Ed. 2d 561 (1977), we held that a similarly worded indictment apprised defendant of the charges against him, particularly in light of clarification at a pretrial hearing. As French's counsel was furnished the tapes of the conversations before trial, *Miller* dictates the same result in this case. French's arguments concerning the indictment are without merit.

French argues that his acquisition and possession of the stamps was lawful, presumably because they were purchased from a government agent.[2] We agree with the rejection of a somewhat similar argument in *United States* v. *Stencil*, 629 F.2d 984, 985 (4th Cir. 1980):

---

[1] French was charged with purchasing food stamps valued at $150 in Count I and II and $250 in Count III.

[2] He argues alternatively that the government agent had authority to make the sale of the food stamps, and that he did not have the authority to make the sale.

> In 7 U.S.C. § 2024(a), Congress authorized the issuance or presentment of food stamps for enforcement purposes. In 7 U.S.C. § 2024(b), Congress made the unauthorized acquisition of food stamps a crime. Obviously, Congress did not intend to exempt from criminal penalties anyone who acquired food stamps from an undercover agent. The fact that a seller is authorized to sell does not mean that the buyer must necessarily be cloaked with authority to buy.

French argues that the evidence was insufficient to prove a violation of the law and that the court erred in overruling his motion to dismiss for insufficient evidence. French seems to argue, ignoring the statute in question, that his use of the stamps or his transfer of them for money must be shown. These arguments, unsupported by authority, are without merit.

French complains of error in the instructions concerning the food stamp program. The instructions, considered as a whole, adequately explained the regulations and the substance of the relevant statutes, and included an explanation that the food stamp program was established for the purpose of making food available to eligible individuals through approved retail food stores. French complains of failure to instruct on a specific regulation relating to participation by banks (Regulation 278.5) and claims that this was the only regulation relating to use of food coupons to detect food stamp violations. This objection was not made at the time of trial, and the regulation had no bearing on the issues being tried. French demonstrates no error in the instructions given by the district court.

French argues that the United States Attorney repeatedly referred to French's prior conviction for purposes other than to test credibility. Our study of the record reflects that the prior conviction was first brought before the jury by French's counsel, who repeatedly questioned French and other witnesses on this subject during trial.

French objects to statements made by the prosecution during the examination on the earlier conviction. These questions or statements were phrased with reference to credibility. The jury was instructed that the conviction was to be considered "only insofar as it affects the credibility of the defendant as a witness, and must not be considered as evidence of guilt of the offense for which the defendant is on trial."

French also objects to a statement of counsel during argument that "immediately after he's put on probation, R. C. French doesn't miss one beat . . . in working out some scheme to abuse the system." Although this statement may deal with more than the question of credibility, it must be viewed in the context of the entire trial. *United States* v. *Phillips*, 482 F.2d 191, 196 (8th Cir. 1973), *cert. denied* 414 U.S. 1114, 38 L. Ed. 2d 741 (1973). The court instructed the jury that arguments of counsel were not evidence. In the context of the entire record, we cannot find that this statement, or the areas of interrogation on credibility, constituted prejudicial error.

Having carefully considered the arguments advanced by appellant French, we find no reversible error by the district court. The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1968

September Term 1981

United States of America,
Appellee,

v.

R. C. French,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

August 24, 1982